No. 96-511

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JANET RENO, Attorney General of the United States, et al.,

Appellants,

—v.—

AMERICAN CIVIL LIBERTIES UNION, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF OF MORALITY IN MEDIA, INC. AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

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INTEREST OF AMICUS

Morality in Media, Inc. ("Amicus"), as Amicus Curiae, files this brief in support of the Appellants in this case, which is before this honorable Court on the merits under the provisions of Rule 37(3)(a). The written consents of the Appellants and Appellees have been requested and all parties have consented thereto in writing. Copies of these consents are being filed concurrently with this brief. Morality in Media has a special interest in this case because it was instrumental in suggesting language to authors of the legislation and also participated as Amicus in the court below, *ACLU v. Reno*, 929 F.Supp. 824 (E.D.Pa. 1996).

Morality in Media is a New York not-for-profit, interfaith, charitable corporation, organized in 1968 for the purpose of combating the distribution of obscene material in the United States and upholding decency standards in the media. Now national in scope, this organization has affiliates and chapters in various states, and its Board of Directors and Advisory Board are composed of prominent businessmen, clergy and civic leaders.

The Founder and President of Morality In Media (until his death in 1985) was Reverend Morton A. Hill, S.J. In 1968, Father Hill was appointed to the President's Commission on Obscenity and Pornography. He, along with Doctor Winfrey C. Link, produced the "Hill-Link Minority Report" of the Commission, which was cited by this honorable Court in *Kaplan v. California*, 413 U.S. 115, 120 n.4 (1973) and in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 at 58, notes 7 and 8 (1973). Morality in Media has also frequently participated as Amicus in cases before this Court, including *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *New York v. Ferber*, 458 U.S. 747 (1982); *Sable Communications v. FCC*, 492 U.S. 115 (1989); *and Denver Area Consortium v. FCC*, 116 S.Ct. 2374 (1996).

Morality in Media is filing this brief in support of

Appellants because it believes indecency on the Internet endangers children, threatens the privacy of the home and undermines the right of the nation to maintain a decent society. Based on the Jurisdictional Statement of the Appellants, Amicus believes its brief contains relevant matter that may not be brought to the attention of the Court by the parties, particularly, that in circumstances where indecency on the Internet constitutes "nuisance speech," it is unprotected by the First Amendment and that the "indecency" standard is an ***Indecent For All*** standard.

SUMMARY OF ARGUMENT

This Court has said there are narrowly limited classes of speech that are unprotected by the First Amendment. One such class is "nuisance speech." Amicus contends that "indecent" speech which, by means of interactive computer services, intrudes uninvitedly into the privacy of the home and is readily accessible to children is a form of "nuisance," which is unprotected by the First Amendment and which Congress can constitutionally regulate, as it has done in the CDA provisions.

The court below indicated children may not need protection from Internet content that is indecent but not obscene. This Court, however, has recognized that speech can be indecent and harmful to children, even though it is not prurient and may have serious value for adults. Furthermore, while Congress' concern in enacting the CDA provisions was protecting children, it utilized an **Indecent For All** standard that grew out of the adult obscenity test. Amicus contends that speech that is **Indecent For All** is a fortiori harmful to children.

In the court below, Appellees argued that the term "indecent" is vague and overbroad. In previous cases, however, this Court has rejected similar challenges. Amicus also contends that properly understood, the nuisance concept greatly reduces the amount of sexual or excretory speech encompassed by the CDA provisions.

The court below opined that the CDA provisions impose unacceptable "barriers to entry" on Internet providers of indecent content, preventing some providers from utilizing some "forms" of Internet communication. The First Amendment, however, does not guarantee a "freedom-from-responsibility" right to utilize the Internet; nor does it guarantee an unrestricted right to use every "form" of Internet communication. Amicus also contends that consenting adults have adequate alternatives to communicate indecently *by using their own computers*.

The court below opined that the CDA provisions would cause "wholesale disruption" on the Internet. Amicus would contend, however, that the Internet did not begin as a toy or windfall for indecency providers and would develop admirably even if all indecency were banned. The CDA provisions, however, do not ban indecency from the Internet.

The court below opined that the CDA provisions would be ineffective because of the international dimension of the Internet. As lawlessness on the international dimension of the Internet grows, however, international pressure will grow with it. Congress can constitutionally now address part of a serious problem without addressing all of it.

The court below also opined that parental use of screening technology is a better approach to the problem. Parental use of screening technology, however, cannot alone adequately protect children from indecency on the Internet.

ARGUMENT
I.
INDECENT COMMUNICATIONS WHICH, BY MEANS OF INTERACTIVE COMPUTER SERVICES, INTRUDE INTO THE PRIVACY OF THE HOME AND ARE READILY ACCESSIBLE TO CHILDREN ARE A FORM OF 'NUISANCE SPEECH' WHICH IS UNPROTECTED BY THE FIRST AMENDMENT

The concept of "nuisance speech," as a class of speech unprotected by the First Amendment, was first alluded to by this honorable Court in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), where the Court stated:

> There are certain, well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene...those which by their very utterance inflict injury or tend to incite an immediate breach of the peace...[S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[1]

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[1] *Id.* at 571-572. Amicus says "alluded to" because the above quoted material, while not specifically mentioning nuisance speech, twice cites to *Free Speech in the United States*, by Zechariah Chafee, Jr. (1941), which does so at pp. 149-150:

> But the law also punishes a few classes of words like obscenity, profanity...because the very utterance of such words is considered to inflict a present injury upon listeners, readers...*[P]roperly limited they fall outside the protection of the free speech clauses...[P]rofanity, indecent talk and pictures*, which do not form an essential part of any exposition of ideas,have a very slight social value as a step toward truth, which is clearly outweighed by the social interests in order, morality, the training of the young and the peace of mind of those who hear or see...The man who

The nuisance rationale was also applied by three Justices dissenting in *Rosenfeld v. New Jersey*, 408 U.S. 901 (1972). Justice Powell, with whom the Chief Justice and Justice Blackmun joined, wrote at 408 U.S. 905-906:

> But the exception to the First Amendment protection in *Chaplinsky* is not limited to words whose mere utterance entails a high probability of an outbreak of physical violence. It also extends to the willful use of scurrilous language calculated to offend the sensibilities of an unwilling audience... [A] verbal assault on an unwilling audience may be so grossly offensive and emotionally disturbing as to be the...subject of criminal proscription, whether under a statute denominating it disorderly conduct, or, more accurately, a public nuisance...The Model Penal Code...also recognizes a distinction between utterances which may threaten physical violence and those which may amount to a public nuisance, recognizing that neither category falls within...First Amendment [protection]. [Emphasis supplied]

In *Breard v. Alexandria*, 341 U.S. 622 (1951) and *Kovacs v. Cooper*, 366 U.S. 77 (1949), this Court upheld nuisance ordinances aimed at means of communication that intrude uninvitedly into the privacy of the home. As the Court in *Kovacs* stated at 366 U.S. at 88-89:

> The preferred position of freedom of speech in a society that cherishes liberty for all does not require legislators to be insensible to claims by citizens for comfort and

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> swears in a street car is as much of a *nuisance* as the man who smokes there. [Emphasis supplied]

Cf., 50 *Am. Jur. 2d* Lewdness, Indecency pp. 484-485 (use of indecent language under certain circumstances "considered a nuisance.") and *Am. Jur. Proof of Facts*, Vol. 8, p. 530 (1960)(nuisance may be established by showing that the "laws of decency" are violated).

convenience. That more people may be more easily and cheaply reached by sound trucks...is not enough to call forth constitutional protection for what those charged with public welfare reasonably think is a nuisance when easy means of publicity are open. [Emphasis supplied]

In *Hess v. Indiana*, 414 U.S. 105 (1973), this Court again identified speech that amounts to a public nuisance as being outside the protection of the First Amendment:

> It hardly needs repeating that '[t]he...guarantees of freedom of speech forbid the States to punish the use of words or language not within `narrowly limited classes of speech.'...Hess' words could [not] be punished as obscene...By the same token, any suggestion that Hess' speech amounted to 'fighting words'...could not withstand scrutiny... In addition, there is no evidence to indicate that Hess' speech amounted to a public nuisance in that privacy interests were being invaded.[2] [Emphasis added]

In *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) ("*Pacifica*"), this Court affirmed an FCC ruling that the monologue, "Filthy Words," as broadcast was indecent and prohibited by 18 U.S.C. 1464. In so doing, the Court observed that the ruling "rested entirely on a nuisance rationale under which context is all-important." Id. at 750.

In *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), this Court held that a student could be penalized for making an indecent speech before a school assembly, attended by both students and faculty. Justice Stevens (dissenting on due process grounds) noted:

> [A] `nuisance may be merely a right thing in the wrong place--like a pig in the parlor instead of the

[2] *Id.* at 107-108. *See also, Redrup v. New York*, 386 U.S. 767, 769 (1967), recognizing a need for government protection against an "assault upon individual privacy."

> barnyard...Vulgar language, like vulgar animals, may be acceptable in some contexts, and intolerable in others...It seems...obvious that [the] speech would be inappropriate in certain...settings."[3]

Amicus contends that "indecent" speech which, by means of interactive computer services, intrudes uninvitedly into the privacy of the home and is readily accessible to children is also "nuisance speech" which is unprotected by the First Amendment and which Congress can regulate, as it has chosen to do by amending 47 U.S.C. 223 to restrict children's access to indecency readily available on the Internet (hereinafter, "CDA provisions").[4]

II.
CHILDREN NEED PROTECTION FROM INTERNET CONTENT THAT IS 'INDECENT' BUT NOT OBSCENE

In the court below (929 F.Supp. at 852-853), Judge Sloviter questioned whether Government has a sufficient interest in protecting children from Internet content that is indecent but not "pornographic." One type of Internet content that concerned Judge Sloviter was information about AIDS (929 F.Supp. at 853).

[3] *Id.* at 696. Cf., *Close v. Lederle*, 424 F.2d 988 (1st Cir. 1970), *cert den.*, 400 U.S. 903 (quoting Wright, Constitution on the Campus, 22 Vand.L.Rev. 1027, at 1058 (1969)):

> There are words that are not regarded as obscene, in the constitutional sense, that nevertheless need not be permitted in every context. Words that might properly be employed in a term paper or in a novel submitted in a creative writing course take on a very different coloration if...bellowed over a loudspeaker at a campus rally or appear prominently on a sign posted on a campus tree.

[4] Amicus does not say indecency is unprotected in every context *Cf., Pacifica*, 438 U.S. at 746 ("We may assume, arguendo, this monologue would be protected in other contexts").

Labelling information about AIDS as "educational," however, does not mean it can't harm children. So-called "AIDS education" ranges from "bio-course" descriptions of sexually transmitted diseases; to "clinical" descriptions of "safer sex;" to explicit descriptions of sexual activities replete with vulgar, obscene language;[5] to hardcore pornography.[6]

Judge Sloviter was also concerned about prison rights groups which use graphic language to describe sexual abuse of prisoners (929 F.Supp. at 853). A report of students who went to court to learn about the legal system, but were inadvertently exposed to a "graphic videotaped" confession of an alleged rapist, indicates children can also be harmed by such content:

> Many of the children, all dressed in neatly pressed outfits, sat wide-eyed. Others snickered, and some appeared uncomfortable, looking down at the floor...The father of one...boy said, "The boys at 13 are...impressionable and certainly interested in hearing about sex. I'm not sure this is the right form for them to hear it."[7]

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[5] In 1994, explicit "safe sex" literature, prepared for adults by the Gay Men's Health Crisis, was distributed at a high school conference, cosponsored by the New York City Board of Education. In the uproar that followed, Schools' chancellor Ramon Cortines said the literature "dealt with sexual practices, contained language that was totally inappropriate and possessed no educational value.", **"This Isn't Kid Stuff,"** *N.Y. Newsday* 3/23/94 Presumably, an "occasional expletive" would not a sanction. *Pacifica*, 438 U.S. at 750.

[6] In *Rees v. Texas*, 909 S.W.2d 264 (Tex. Ct. App. 1995), *cert. den.*, 65 LW 3261 (U.S. 10/7/96), two men were convicted of promoting obscenity for showing a "sexually explicit" film on a public access cable TV program. On appeal they argued unsuccessfully that the purpose of the after-midnight program, "Infosex," was to promote "safe sex techniques," and that the film, "Midnight Snack," had "educational value." As described in the indictment, the film depicted "a man with the penis of another man in his mouth, a man placing his finger in the anus of another, a man with his tongue licking the anus of another and two men masturbating each other."

[7] **"School kids get a lurid lesson,"** *N.Y. Daily News*, 9/27/96.

In *Pacifica*, this Court recognized that children can be harmed by sexual or excretory speech that is "'vulgar,' 'offensive,' and 'shocking,'" even though it isn't prurient and may have serious value for adults. Id., 438 U.S. at 747. *In Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), this Court also recognized that a speech that was "offensively lewd and indecent" (Id. at 683), but not obscene, could be "seriously damaging" to a "less mature audience" (Id. at 558).

In *Denver Area Consortium v. FCC*, 64 LW 4706 (1996)(hereinafter "*Denver Area Consortium*"), Justice Breyer, after noting that this Court has often found "compelling" the government interest in protecting children from "patently offensive sex-related material," indicated that depending on context, such material can be "patently offensive" even though it has "nonprurient purposes" and has serious value. Id. at 4712-4713 (plurality opinion).

Furthermore, while Congress' concern in enacting the CDA provisions was protecting children, it utilized a standard, "indecent" or "patent offensiveness," that grew out of the *obscenity test* and is an **Indecent For All** -- not an indecent for children[8] -- standard. Amicus contends that sexual or excretory speech that is **Indecent For All** is a fortiori harmful to children.[9] The meaning and origin of the "patent offensiveness" and "indecency" concepts are described in the *Obscenity Law*

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[8] *Cf., Ginsberg v. New York*, 390 U.S. 629 (1968).

[9] The requirement that sexual or excretory speech be depicted or described in a "patently offensive" manner distinguishes the CDA provisions from the ordinance at issue in *Erznoznick v. City of Jacksonville*, 95 S.Ct. 2268 (1975), which forbade the display of all films containing "any uncovered buttocks or breasts, *irrespective of context or pervasiveness*." *Id.*, at 2274. [Emphasis supplied]

Reporter:[10]

> In *Manual Enterprises, Inc. v. Day*, 370 U.S. 478 (1962), Justices Harlan and Stewart...added a new element to the...test for obscenity by requiring that the material...also be "patently offensive"...They stated, "These magazines cannot be deemed so offensive on their face as to affront community standards of decency--a quality that we shall hereafter refer to as 'patent offensiveness' or 'indecency.'" The two justices also noted that the American Law Institute's draft of a Model Penal Code took the position that for a thing to be obscene, it must go substantially beyond the limits of candor in description or representation of such matters. [Emphasis supplied]

In *Pacifica*, this Court noted that in *Manual Enterprises*, Justice Harlan used the term "indecency" as a "shorthand term" for "patent offensiveness," a usage the *Pacifica* Court found "strikingly similar" to the FCC's definition of indecency at issue in that case. 438 U.S. at 740, n.15. The *Pacifica* Court also said the "normal definition of 'indecent' merely refers to nonconformance with accepted standards of morality" (438 U.S. 726, at 740) and recognized a valid interest in shielding not just children but also adults in the privacy of their homes from the searing string of obscenities at issue in that case.[11]

In *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, at 682 (1986), this Court noted members of Congress were prohibited from using "indecent language against the proceedings of the House." The *Bethel* Court also stated:

> "[S]chools must teach by example the shared values of a civilized social order....The pervasive sexual innuendo in

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10 Chapter on "Patent Offensiveness," Vol. 1, pp. 7002-7003 (National Obscenity Law Center 1986).

11 *Id.*, 438 U.S. 748-749, Justice Powell, concurring, at 759-760. See also, *Denver Area Consortium*, 64 LW at 4710-4711.

> [the student's] speech was plainly offensive to...teachers and students--indeed to any mature person." 478 U.S. at 683 [Emphasis added]

In *Barnes v. Glen Theatre*, 501 U.S. 560 (1991), this Court upheld an Indiana statute prohibiting "Public Indecency." In so doing, Chief Justice Rehnquist noted:

> "Public indecency statutes of this sort...reflect the moral disapproval of people appearing in the nude among strangers in pubic places....Thus the public indecency statute furthers a substantial government interest in protecting order and morality."[12]

In arguing that the indecency standard is an **Indecent For All standard**, Amicus would also argue that not just the well-being of children but also the privacy of the home[13] needs protection from Internet indecency. Both adults and children can be surprised by indecency on the Internet,[14] and as the Internet

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12 *Id.* at 568-569. While the plaintiffs in *Barnes* were "sexually oriented businesses," the statute at issue was not aimed at the "erotic message" of dancers. 501 U.S. at 568-569.

13 In *Frisby v. Schultz*, 487 U.S. 474, 484-485 (1988, this Court described the "interest" in protecting the well-being, tranquility, and privacy of the home as being "certainly of the highest order in a free and civilized society." The Court then stated at 484-485:

> One important aspect of residential privacy is protection of the unwilling listener...Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that government may protect this freedom. See, e.g., *FCC v. Pacifica*, 438 U.S. 726, 748-749 (1978)...; *id.*, at 759-760 (Powell, J. concurring in part and concurring in judgement).

See also, *People v. Starview Drive-In Theatre*, 427 N.E.2d 201 (Ill. App. Ct. 1981), *appeal dism'd sub nom., Starview Drive-In Theatre v. Cook Co.*, 457 U.S. 1113 (1982).

14 Cf., op ed article "The Internet's Private Side," N.Y. Times, 3/2/96, wherein author David S. Bennahum, publisher of MEME, an

becomes more like broadcasting,[15] both will increasingly be unwillingly "assaulted"[16] by indecent content. Amicus would also contend that the CDA provisions, which regulate sexual or excretory speech portrayed in a manner so offensive as to make it **Indecent For All** do not reduce the adult population to viewing only what is fit for children.

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on-line newsletter, states:

> During a jaunt through the World Wide Web, I came across a seemingly innocuous invitation, 'This is a HOT link.' I clicked on the glowing words, which connected me with another computer that generated a picture of a nude woman with the tag line 'Slut for Rent'...This phone-sex service..., just an accidental mouse click away, shows how easily browsers can stumble across pornography on computer networks.

15 See, e.g., **"Channel surfing to the Web,"** *USA TODAY*, 1/9/97 (WebTV-like products that turn TVs into Internet surfboards and make web more like TV); **"PC Meets TV: The Plot Thickens,"** *Business Week*, 12/23/96 (pages similar in look to Web pages "broadcast" to PC); **"How Net Is Becoming More Like TV To Draw Advertisers,"** *Wall Street Journal*, 12/13/96 (Web "surfers" who sift through data giving way to Web "viewers" who have information "pushed" directly to PCs); **"Way paved for PCTVs,"** *Broadcasting & Cable*, 12/2/96 (TV "channel surfers" trading in remote controls for a mouse and keyboard); **"TV Screen Opens Onto Internet,"** *N.Y. Times*, 10/22/96 (computer network transformed into something "like a TV network); **"Web music networks take programming beyond radio dial,"** *USA TODAY*, 1/6/96 (Net "radio stations" with "continuous real-time audio").

16 In *Pacifica*, this Court compared patently offensive, indecent broadcast programming to a physical assault: "To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow. *Id.* at 438 U.S. 748-749.

III.
THE 'INDECENCY' STANDARD IS NEITHER VAGUE NOR OVERBROAD

In the district court below, Appellees argued that the term "indecent" is vague and overbroad. In *Pacifica*, however, this Court, rejected a very similar challenge:

> [Pacifica] argues that the Commission's construction of the statutory language broadly encompasses so much constitutionally protected speech that reversal is required...At most, however, the Commission's definition of indecency will deter only the broadcasting of patently offensive references to excretory and sexual organs and activities. While some of these references may be protected, they surely lie at the periphery of First Amendment concern...The danger dismissed so summarily in Red Lion...was that broadcasters would respond to the vagueness of the regulations by refusing to present programs dealing with important social and political controversies. Invalidating any rule on the basis of its hypothetical application to situations not before the Court is "strong medicine" to be applied "sparingly and only as a last resort...We decline to administer that medicine to preserve the vigor of patently offensive sexual and excretory speech. 438 U.S. at 742-743.

In Denver Area Consortium, this Court specifically rejected a vagueness challenge to a definition of indecency similar to the one at issue here, noting the similarity of that definition to the "patently offensive sexual conduct" prong of the obscenity test.[17] A definition of indecency similar to the one at issue here was also upheld in *Dial Information Services Corp. of New York v. Thornburgh*, 938 F.2d 1535 (2nd Cir. 1991), *cert. den.*, 60 LW

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17 *Id.*, at 4712-4713. In *Miller v. California*, 413 U.S. 15, at 27-28 (1973), this Court pointed to the "patently offensive" prong of its obscenity test as providing fair notice to distributors of sex materials.

3520 (U.S. 1992). There is also an extensive history of court and FCC rulings to guide content providers in determining what is "indecent."[18]

Amicus would also argue that, properly understood, the indecency definition and nuisance concept greatly reduce the amount of speech encompassed by the CDA provisions. The test is not whether content is "offensive," but rather whether it is "*patently offensive.*" The test is not whether content is "offensive" to a some citizens, but rather whether it is patently offensive under "*community standards.*"[19] The test is not whether the community disagrees with the speaker's view,[20] but rather whether sexual or excretory speech is depicted or described in a manner so offensive as to be unacceptable under community standards.

In determining whether such speech constitutes a nuisance, "context is all-important." *Pacifica*, 438 U.S. at 750. Whether in the physical realm or in cyberspace, "place" is an important variable in determining whether something is a nuisance, since a "nuisance may be merely a right thing in the wrong place,--like a pig in the parlor instead of the barnyard."

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18 *See, e.g., Pacifica*, 438 U.S. at 741, n.16; and "Five Indecency Complaints Dismissed by the FCC," *N.Y. Times*, 4/9/88 [including one against a TV station that broadcast a "sex education" program for teens (with "frank discussions of sexual topics, the use of sex-organ models and simulated demonstrations of various birth control devices") and another against a radio station for airing a reading from "Ulysses" (with sexual and excretory references "dispersed" throughout the three-hour reading)],.

19 The relevant community is that embraced within the territory comprising the jurisdiction of the Federal District Court, and while some districts may be more "conservative" than others, none is as hyper-sensitive as portrayed by Appellees.

20 *Pacifica*, 438 U.S. at 745-746. See also *Denver Area Consortium*, 64 LW at 4718 (Stevens, J., concurring) ("viewpoint neutral").

Pacifica, 438 U.S. at 750. Speech that may be acceptable in a part of "cyberspace" devoted to health or human rights, may be patently offensive in an area devoted to "indoors activities for families."

Just as the content of a broadcast program will affect the composition of the audience (see *Pacifica*, 438 U.S. at 750), so too will the content of a cyberspace "site." For example, a site devoted to "Hot chicks to fulfill your lusts" will likely attract far more minors than a site devoted to poetry or drama.[21] Other aspects of "context" to be considered include the time of day;[22] whether the communication "appeals to the prurient interest"[23] or is pandered for its "prurient appeal;"[24] whether viewers are confronted without warning;[25] and whether the content has "serious value."[26] As noted in *Pacifica*:

> Some uses of even the most offensive words are unquestionably protected...Indeed, we may assume, *arguendo*, that this monologue would be protected in other

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21 Audience composition affects "patent offensiveness" because minors should be considered only to the extent they are likely to be recipients. *Cf., Pinkus v. United States*, 436 U.S. 293, at 298 (1978).

22 *Pacifica*, 438 U.S. 726, at 750. While not all indecent communications in cyberspace can be time channelled, many, particularly live communications, can be time channelled.

23 While content can be "indecent" without being prurient (Pacifica, 438 U.S. at 741), prurient content is much more likely to be "patently offensive." *Cf., Manual Enterprises v. Day*, 370 U.S. at 486.

24 *Cf., Ginzburg v. United States*, 383 U.S. 463 (1966).

25 *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, at 127-128 (1989).

26 Serious value is a key variable in determining whether content is indecent. *Cf., Pacifica*, 438 U.S. at 732, n.6; *Action for Children's TV v. FCC*, 852 F.2d 1332, at 1339-1340 (D.C.Cir. 1988).

> contexts. Nonetheless, the. . .protection accorded. . .a communication containing patently offensive sexual or excretory language need not be the same in every context. It is a characteristic of speech such as this that both its capacity to offend and its 'social value'...vary with the circumstances. ...Because content of that character is not entitled to absolute constitutional protection under all circumstances, we must consider its context in order to determine whether the Commission's action was constitutional. 438 U.S. at 746-747.

In response to the concern that the CDA provisions reach "speech subject to the full protection of the First Amendment" (929 F.Supp. at 855), *Pacifica* (opinion of Stevens, J.) has also said that indecent speech is at the "periphery of First Amendment concern"[27] and that since indecency restrictions have their "primary effect on the form, rather than the content, of serious communication," there are "few, if any, thoughts that cannot be expressed by the use of less offensive language." *Pacifica*, 438 U.S. at 743, n.18.

IV.
THE CDA DOES NOT ERECT UNCONSTITUTIONAL 'ENTRY BARRIERS' TO SENDING OR RECEIVING INFORMATION VIA INTERACTIVE COMPUTER SERVICES

In the court below (929 F.Supp. at 856-857, 877-879), Judges Sloviter and Dalzell opined that the CDA provisions are unconstitutional because they would impose unacceptable

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27 *Pacifica*, 438 U.S. at 743. *See also, Bethel School District*, 478 U.S. 675, 688 (1986)(quoting from *Pacifica* and *Chaplinksy v. New Hampshire*, 315 U.S. 568, 572); *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988) ("not all speech is of equal First Amendment importance"); *Barnes v. Glen Theatre*, 501 U.S. 560, 566 (1991); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 422 (1991) (Stevens, J., concurring).

"barriers to entry" on Internet content providers of indecent content, preventing some providers from fully utilizing every "form" of Internet communication. Amicus, however, contends that the First Amendment does not guarantee a "freedom-from-responsibility"[28] right to utilize the Internet; nor does it guarantee an unrestricted right to use every "form" of Internet communication.

Licensees of the most influential means of communication in this century (broadcasting), have been prohibited from airing indecent material since 1927, and the impossibility of shielding youth from broadcast indecency without "restricting the expression at its source" (Pacifica, 438 U.S. at 749) was the justification for upholding the law, not a reason to invalidate it. Nor do TV companies have an unrestricted right to transmit indecency on every "form" of TV communication.[29] Companies that own both TV broadcast stations and cable TV systems must confine indecent programming to their cable systems. If Congress enacts a law prohibiting indecent programming on basic cable, these companies will have to confine indecent programming to premium or pay-per-view cable channels.

Indecent programming on cable TV leased access channels can also be prohibited (Denver Area Consortium, 64 LW 4706), and while this Court invalidated the statutory provision allowing cable operators to ban indecent programming on public access channels, the plurality opinion indicated "public/nonprofit programming control systems...would normally avoid, minimize, or eliminate any child-related problems concerning patently offensive programming." Id. at 4715-4716.

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28 *Cf., Near v. Minnesota*, 283 U.S. 697, at 713-714 (1931) (distinguishing between "previous restraints" upon publication and "subsequent punishment" for what is contrary to the public welfare).

29 The *Pacifica* Court treated "differences" between forms of communication as a "variable" in determining whether language constituted a "nuisance." 438 U.S at 750.

Indecent dial-it services must also restrict minors' access to their services. The Federal "dial-a-porn" law applies to commercial providers because commercial dial-it services are the overriding indecency problem in the telephone medium. With the Internet, however, a great deal of the indecent content is free,[30] and free content is almost always offered without restriction.

Adults can also negotiate with others to bring forms of Internet communication into compliance with the CDA provisions or set up their own forms which do comply. While *City of Renton v. Playtime Theatres*, involved availability of property "sites," the reasoning should also apply to cyberspace "sites:"

> That respondents must fend for themselves...on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation...[W]e have never suggested that the First Amendment compels Government to ensure that adult theaters, or...other...speech-related businesses..., will be able to obtain sites at bargain prices. 106 S.Ct. 925, at 932 (1986).

Persons with computers linked to the Internet also have access to alternative sources of communications.[31] In fact, consenting adults have many inexpensive ways to either obtain or send indecent communications *by using their own computers*.[32]

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30 **See, e.g., "Electronic Erotica: Too Much Traffic,"** *Wall Street Journal*, 2/8/95 (users like fact that "on-line pornography is free").

31 *Cf., Pacifica*, 438 U.S at 750 n.28; *Denver Area Consortium*, 64 LW at 4711.

32 For example, one-on-one e-mail, computer "bulletin boards" or the telephone. See e.g., **"Soon, phones will be called upon to do more,"** USA TODAY, 1/9/97 (visions of the telephone's future include, "as a mini-PC"); **"Intel and Microsoft to Sell Video Phones For Use on Internet,"** Wall Street Journal, 12/9/96; **"Expanding the Boundaries of E-Mail,"** *N.Y. Times*, 9/23/96; **"Calling Long Distance, on a PC and the Internet,"** *N.Y. Times*, 5/19/96.

The "burden" of complying with the CDA provisions can also be reduced for many Internet content providers by segregating "indecent" content and requiring proof of age only for that content--just as mainstream bookstores, videostores, convenience stores and libraries already do. That many or all of the Appellees may not want or desire to deny children access to indecent content is not the same thing as being unable to do so. Amicus would also point out that just as current adult obscenity and harmful-to-minors laws do not impose "strict liability" on book, video and convenience stores, so the CDA indecency provisions do not impose strict liability on Internet content providers.

In a related concern, Judge Sloviter also opined (929 F.Supp. at 854) that Internet content providers would be unable to avail themselves of the statutory defenses because even if they could attempt age verification, there is little assurance they could successfully filter out minors. While Internet content providers may now be unable to take steps to ensure that <u>everyone</u> who provides proof of age is in fact not a minor, they can take reasonable, effective and appropriate steps to verify age[33] <u>which will help</u> deter accidental and "spur of the moment" decisions and <u>will also deter</u> minors unable or unwilling to engage in lying, stealing or forging in order to provide age verification.

As described in the monograph, "The Popular Myth of Victimless Crimes,"[34] law also has a "teaching" and "standard-setting" function. By reinforcing society's moral values, the law deters behavior that is harmful to society or individuals, irrespective of whether it can be effectively enforced in a given

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33 State laws restricting minors access to alcohol, cigarettes and pornography do not require retailers to ensure to a certainty that those who purchase these products over-the-counter are not minors, but such laws do require retailers to check identification.

34 Dallin H. Oaks, Brigham Young Univ. Press, Provo, Utah.

situation. Ask retailers whether theft is a big problem, and the answer will be "Yes." But ask consumers whether theft laws have ever discouraged them from stealing, and many if not most will also say "Yes."

V.
CDA PROVISIONS WILL NOT CAUSE WHOLESALE DISRUPTION ON THE INTERNET

In the court below (929 F.Supp. at 877-879), Judge Dalzell opined that the CDA provisions will cause "wholesale disruption" on the Internet and have a major impact on Internet technology and adult participation. It is by no means clear, however, why a restriction on indecent communications will have such a drastic effect. The Internet began as a National Defense project and developed rapidly without serving as a primary conduit for indecency.[35] Just as national self-preservation was and is a powerful motivation to encourage development of the Internet, so now research and education,[36] politics, religion and financial gain[37] also serve as powerful motivations.[38]

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35 Although individuals misused the system, it was financed by the government and established and used primarily for governmental, educational and research purposes.

36 A group of universities recently agreed to create a second Internet. **"34 Universities Agree to Set Up Another Internet,"** *N.Y. Times*, 10/7/96.

37 Most businesses are trying to block employee access to indecent content, not increase it. See, e.g., **"New Issue at Work: On-Line Sex Sites,"** *N.Y. Times*, 6/27/96; **"Parental Control Software Effectively Monitors Employees Internet Activity--Improves Productivity,"** PR Newswire, 3/26/96.

38 See, e.g., **"Awards acknowledge Internet Innovation,"** *USA TODAY*, 12/4/96 (Ten projects received National Information Infrastructure Awards for demonstrating innovative uses of the Internet to benefit industry and society. The projects included the NSF Fastlane Project; Wall Street Journal Interactive Edition; Faces of Adoption; Starbright World, helping seriously ill children overcome

Furthermore, the CDA provisions only affect speech which, in context, depicts or describes, in terms patently offensive, sexual or excretory activities or organs. Only a tiny fraction of communications necessary for government, research, education, politics, business and other matters of public concern, as well as for matters of private concern, may be indecent.

As stated above, the CDA provisions do not impose strict liability on Internet content providers. As also stated above, there are many ways for consenting adults to use a personal computer and the Internet to transmit indecent content without violating the CDA provisions.

VI.
INTERNATIONAL DIMENSION OF THE INTERNET DOES NOT PREVENT CONGRESS FROM ADDRESSING THE DOMESTIC DIMENSION

In the court below (929 F.Supp. at 882-883), Judge Dalzell stated that the CDA provisions "will almost certainly fail to accomplish the Government's interest in shielding children from pornography on the Internet" because much Internet content is available internationally.[39] That some content providers may circumvent the CDA provisions, however, does not mean the law won't deter U.S. citizens and foreign entities with U.S. affiliates.[40]

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isolation; Jason VII Project, bringing actual research to 2 million students; Applied Informatics, coordinating health care service; and Charlotte's Web, designed to help people use the Internet to improve their lives and encourage civic involvement.).

39 In particular, Judge Dalzell said that the "residents of Amsterdam have little incentive to comply with the CDA." But see, **"Netherlands-Internet Porn,"** APn 12/30/95 (Amsterdam-based Internet service Xs4all shut off a subscriber's on-line access after the user scanned hundreds of pornographic pictures of children onto the computer network.).

40 See, e.g., **"Foreign entities whose WEB sites violate U.S. laws relating to...obscenity may subject American affiliates to prosecution,"**

Furthermore, as the Internet grows and the plague of illegal activity now present on the Internet continues to grow along with it, international pressure against pornography can be expected to increase.[41] For example, anonymous servers or "remailers" can make it difficult to track down criminals, but one of the world's largest international remailers was recently closed, after accusations it was used for child pornography.[42]

Law enforcement agencies are having difficulty enforcing many laws on the Internet, including those pertaining to child porn, copyright, fraud, harassment, libel, gambling, child abuse, terrorism and theft. That "Internet outlaws" may now be winning is not a reason to declare these laws unconstitutional, just as there is no reason to invalidate the Federal dial-a-porn law because international connections make its enforcement more difficult or the Federal satellite-porn law because transmissions from foreign-owned satellites make its enforcement more difficult.

This Court has recognized that Legislative bodies can attack one problem at a time and can experiment with solutions to admittedly serious problems.

National Law Journal, 11/18/96.

41 *See, e.g.*, "British Govt Moves To Stamp Out Internet Porn," COMTEX Newswire, 9/27/96; "Euro-Comm to tackle Internet porn," Reuters Financial Report, 9/24/96; "Singapore blocks 'a few dozen' Internet porn sites," Reuters NA, 9/20/96; "Germany Plans to Punish Internet Indecency," Reuters NA, 8/22/96; "ASEAN sets stage for possible Internet regulations," Reuters NA, 3/7/96.

42 See, "Stamp Electronic Mail With Name?," *N.Y. Newsday*, 1/4/94 and "Finn to close Net Remailer after Child Porn Claim," *Reuters World Report, 8/30/96.*

VII.
PARENTAL USE OF SCREENING TECHNOLOGIES CANNOT ALONE PROTECT CHILDREN FROM INDECENT CONTENT ON THE INTERNET

To head off regulation, the telecommunications industry embarked on a huge public relations campaign to promote the use of screening technology to shield children from pornography on the Internet.[43] It should not be assumed, however, that all parents are deeply involved with their children's lives,[44] and are keeping abreast of the matter,[45] and are overcoming their "technophobia"[46] and are solving the problem of the "two-computer family."[47]

Recent disturbing statistics on teen smoking and drug use, HIV rates among gays and deaths involving drunk drivers should caution us about putting too much reliance on PR campaigns. We should also learn something from parental failure to use available methods of keeping other sources of pornography out of the home.

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43 *See, e.g.*, "Plan to Block Censorship on Internet--Preemptory Effort At Self-Policing," *N.Y. Times*, 3/13/96.

44 "Comprehensive Study Finds Parents and Peers are Most Crucial Influences on Students," *N.Y. Times*, 8/7/96 (Author of a study to determine the most crucial influences on students says parents have become "seriously disengaged" from their children's lives.).

45 "Study: Public Tuning Out T.V. News," *N.Y. Newsday*, 5/13/96 (A major study by the Pew Research Center reported a widespread decline in the number of adults who watch nightly TV news programs.); "Few Are Interested in Most News Stories, Survey Finds," *L.A. Times*, 12/30/95 (Report by the Times Mirror Center for the People and Press indicated only one in four pays very close attention to most news.)

46 "Technophobia," *N.Y. Newsday*, 5/21/94.

47 "The Rise of the Two-Computer Family," *N.Y. Times*, 6/29/95.

One would think that every parent would have contacted the Postal Service, phone companies and cable operators to have pornography blocked -- before there is a problem. But most don't act until after a problem is discovered.

Even if parents utilize screening technology, however, they cannot rest assured their children will be protected. No technology can guarantee that all indecent material on the Internet will be blocked. Programs which block access to specific sites must keep up with the exploding number of sites. Indecent material also "pops up" in areas where it isn't suppose to--including kids' sites.[48] Programs that screen for words and phrases can be fooled; programs which screen images are imperfect. Screening technology that depends on providers to rate themselves will suffer from noncompliance, poor judgment and pranks.

Furthermore, if major companies and the U.S. Government protect their computers against teen "hackers," screening technology will not keep tech-savvy teens away from indecency available without restriction.[49] As younger and

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48 **"America Online to Tighten Security to Protect Kids,"** *Dow Jones Wire Service*, 3/20/96 (America Online member disseminated obscene images in a kid's area).

49 In *Sable Communications California v. FCC*, 492 U.S. 115, 130 (1989), the Supreme Court struck down a total ban on indecent commercial telephone messages, reasoning in part that, "For all we know...the FCC's technological approach to restricting dial-a-porn messages to adults who seek them would be extremely effective, and only a few of the most enterprising and disobedient young people will manage to secure access to such messages." There is a difference, however, between gaining access to a dial-a-porn service by engaging in a morally culpable act (e.g., stealing a credit card or forging an ID), and gaining access to an Internet site by being smarter than the technocrats. Furthermore, stolen or forged ID's can only be circulated so far, but "smarts" can be transferred to any kid with access to computers at school, home or elsewhere. Indecent material on the Internet is also free of charge, which means that there are no financial

younger children become "computer literate," even they can be expected to learn how to outsmart screening technology.

But even if all parents used screening technology And all such technology was 100% effective And 100% tamper-proof, there would still be a problem. Technology on home computers does not protect children or teens when they access computers elsewhere, for example, at a friend or relative's home, public school,[50] library, place of employment, retail business,[51] "Internet Cafe," or hotel or motel. Handheld computers that allow e-mail and Internet browsing will also soon be readily available.[52]

CONCLUSION

Parental use of screening technologies cannot ensure that children will not be exposed to indecency on the Internet. The CDA provisions are needed, and the issue now before this honorable Court is whether the right to live and raise children in a decent society outweighs the claimed right to disseminate, without restriction or "burden," patently offensive sexual and excretory speech on the Internet.

While this Court has held that "indecent" communications are protected by the First Amendment in some contexts, it has also held that where unwilling adults are assaulted by indecent programming in the privacy of the home and where children have

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barriers and no home phone bills to alert parents to the problem.

50 Not all schools use screening technology. *See, e.g.*, **"Students Told to Abide by Rules of Superhighway,"** *L.A. Times*, 8/26/96.

51 *See, e.g.*, **"Kinko's Adds Internet Services to Its Copying Business,"** *N.Y. Times*, 3/18/96 (Kinko's, with roughly 850 outlets nationwide, has added Internet services to its copying business.).

52 **"Handheld computer market about to surge,"** *USA TODAY*, 10/28/96.

ready access to it, indecent material can be restricted, and restricted at its source.

The CDA provisions do not ban consenting adults from using the Internet to communicate indecently;[53] nor do they drive "certain ideas or viewpoints from the marketplace."[54] They do protect "rights and interests, 'other than those of the [indecency] advocates'"[55]--which include the protection of children, the privacy of the home and the "right of the Nation...to maintain a decent society."[56]

Upholding the provisions will also help ensure that the Internet will not become a toxic, technological sewer or, perhaps more accurately, a public nuisance and will help discourage that "permissiveness" which can only "tend further to erode public confidence in the law--that subtle but indispensable ingredient of ordered liberty."[57]

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[53] The district court below relied in significant measure on *Sable Communications of California v. FCC*, 492 U.S. 115 (1989) for the assertion that the CDA provisions are unconstitutional on their face. In *Sable*, this Court held that a TOTAL BAN on indecent telephone communications was not narrowly tailored to serve the admittedly compelling interest of shielding minors from such communications.

[54] *R.A.V. v. City of St. Paul*, 505 U.S. 377 at 381 (1992).

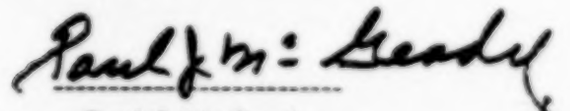
[55] *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, at 58 (1973)(quoting from *Breard v. Alexandria*, 341 U.S. 622, 642 (1951)).

[56] *Paris Adult Theater*, 413 U.S. at 59-60 (quoting from *Jacobellis v. Ohio*, 378 U.S. 184, 199 (1964) (Mr. Chief Justice Warren, dissenting)]. Amicus would contend that the CDA provisions can thus properly be viewed as "content neutral" time, place and manner restrictions, in that they are justified without reference to the content of the regulated speech.

[57] *Rosenfeld v. New Jersey*, 408 U.S. at 902 (Burger, C.J., dissenting).

For all of the above, the decision of the Eastern District of Pennsylvania should be reversed.

Respectfully submitted



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